IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

ADIDAS AMERICA, INC., **08-CV-91-BR**

Plaintiff, **ORDER**

v.

MICHAEL CALMESE,

Defendant.

DAVID K. FRIEDLAND
JAIME S. RICH
Lott & Freidland, P.A.
355 Alhambra Circle, Suite 1100
Coral Gables, FL 33134
(305) 448-7089

STEPHAN M. FELDMAN
Perkins Coie, LLP
1120 N.W. Couch St., 10th Floor
Portland, OR 97209
(503) 727-2058

Attorneys for Plaintiff

MICHAEL CALMESE
3046 N. 32nd Street, Unit 321
Phoenix, AZ 85018
(602) 954-9518

Defendant, *Pro Se*

BROWN, Judge.

This matter comes before the Court on Defendant Michael Calmese's Notice (#238) of Plaintiff's Failure to Comply with this Court's Order Doc. 209 in which Defendant "moves this Court to either issue an order compelling adidas and/or West Court Reporting Services to finally produce the original deposition for Defendant's forensic expert witness, for the second time or dismiss adidas's cancellation claim due to nondisclosure of the April 23, 2010 deposition once and for all." For the reasons that follow, the Court **DENIES** the relief sought by Defendant in his Notice (#238).

BACKGROUND

On July 29, 2010, the Court issued an Order (#209) regarding the parties' dispute over the video and transcript of Defendant's deposition, which Defendant asserts Plaintiff has altered. In that Order, the Court stated:

> The Court directs Plaintiff to make a filing no later than August 6, 2010, in which Plaintiff states whether it intends to offer all or portions of Defendant's deposition at trial. If so, . . . Plaintiff (1) shall specify the bases on which it proposes to authenticate the deposition at trial and (2) shall propose a mechanism to ensure Defendant can be prepared to make his challenge of the deposition's authenticity. **If necessary, Plaintiff shall secure the**

> **original deposition video and provide Defendant with reasonable access to the video so that his expert to review that original recording.**

Emphasis added.

On August 6, 2010, Plaintiff filed its required Response (#210) to the Court's July 29, 2010, Order, in which Plaintiff stated, *inter alia*:

> [T]he original videotape of Calmese's deposition is available for inspection by Calmese and/or his expert at the office of West Court Reporting Services, 221 Main Street, San Francisco, CA, at a mutually agreeable date and time. Given Calmese's unsubstantiated accusations of wrongdoing on the part of adidas's counsel (and the reporters who transcribed and videotaped his deposition), adidas and its counsel are unwilling to take possession of the original deposition video and thereby risk subjecting themselves to further unfounded accusations by Calmese.

On August 10, 2010, the Court issued an Order (#213) in which the Court adopted Plaintiff's plan to make the deposition video available for Defendant's review. The Court ordered:

> Plaintiff shall ensure West Coast Court Reporting Services receives a copy of this Order and shall file no later than August 16, 2010, an appropriate pleading confirming West Coast Court Reporting Services acknowledges its responsibilities as provided in this Order. West Coast Court Reporting Services shall maintain custody of the original video recording of the Calmese deposition and shall make the original video recording available for inspection by Defendant Calmese and/or his designated expert at its San Francisco offices, 221 Main Street, San Francisco CA, at a date and time before August 31, 2010,

> mutually agreeable to West Coast Court Reporting Services, Defendant Calmese and/or his designated expert, and Plaintiff and/or its counsel.

On August 13, 2010, Plaintiff filed its Response to the Court's August 10, 2010, Order, in which Plaintiff stated:

> (1) On August 10, 2010, counsel for adidas provided a copy of the Court's August 10, 2010 Minute Order to West Court Reporting Services, which adidas notes has recently changed its name to Westlaw Deposition Services ("Westlaw"); and
>
> (2) On August 10, 2010, Westlaw provided adidas's counsel with written acknowledgment of its receipt of the Court's August 10, 2010 Minute Order, and further acknowledged its responsibilities under the Court's August 10, 2010 Minute Order. Specifically, Westlaw acknowledged that it (a) shall maintain custody of the original video recording of the deposition of defendant Michael D. Calmese ("Calmese") in its office in San Francisco, California, and (b) shall make the original video recording available for inspection by Calmese and/or his designated expert at its San Francisco office, at a mutually agreeable date and time before August 31, 2010.

Plaintiff also filed a Certificate of Service indicating Plaintiff sent Defendant a copy of its Response by mail and email.

On August 16, 2010, Defendant filed a Response (#216) to the August 10, 2010, Order, which began a string of pleadings in which Defendant maintained the Court issued an Order on July 29, 2010, that Plaintiff take possession of the deposition video to permit Defendant's review. Defendant repeatedly quotes the

Court's Order (#209). Defendant, however, omits the Court's use of the conditional language "if necessary" and thereby makes it appear as if the Court, in fact, ordered Plaintiff to secure physical possession of the deposition video. In his Response, Defendant specifically states:

> [T]his Court ORDERED Plaintiff adidas to, ". . . . secure the original deposition video and provide Defendant with reasonable access to the video so that his expert to review that original recording." (Doc. 209). On August 9, 2010, Plaintiff adidas filed its Response to the Courts July 29, 2010, and stated Plaintiff would not comply with this Court's ORDER. (Doc.210). On August 10, 2010, Defendant Calmese properly filed his Reply to adidas refusal to comply with the July 29, 2010 Court ORDER. (Doc. 212).

Plaintiff, however, states its counsel has explained to Defendant that he has misinterpreted the Court's Order (#209) and, in any event, that the August 10, 2010, Order is the operative one regarding this issue. Nonetheless, Defendant continues to misrepresent the Court's Order. On August 20, 2010, for example, Defendant filed an unauthorized Reply (#219) in which he repeated his argument: "Notwithstanding the fact that the Court squarely ordered adidas to, '. . . secure the original deposition video.'"

On September 8, 2010, Defendant filed a Notice (#238) of Plaintiff's Failure to Comply with this Court's Order. In the Notice, Defendant again states: "[T]his Court specifically Ordered Plaintiff to 'secure the original deposition video and

provide Defendant with reasonable access to the video so that his expert to review that original recording.'" In this instance, Defendant no longer replaces the Court's conditional "if necessary" with ellipses as in previous filings. Defendant further states:

> If this Court does not enforce disclosure of the original for examination and if this Court fails to dismiss the April 23, 2010 deposition based on non-disclosure of the original, this may certainly be grounds for appeal, if not dismissal with prejudice. . . . Calmese respectfully requests that the Court either issue an order compelling adidas and/or West Court Reporting Services to finally produce the original deposition for Defendant's forensic expert witness, for the second time or sanction Plaintiff in the form of dismissing adidas's cancellation claim due to nondisclosure of the April 23, 2010 deposition and ordering adidas to compensate Defendant for his time and expense in retaining a forensic audio/video expert and replying to Plaintiff s excuses for not complying to this Court's ORDER (Doc. 209).

On September 9, 2010, Plaintiff filed its Response (#244) to Defendant's Notice (#238). Plaintiff states:

> Whether Calmese's Notice is deemed to be a motion for leave to file a motion to compel or an actual motion to compel is immaterial, because in either event, the Notice is both utterly frivolous and represents yet another direct violation of this Court's prior Orders forbidding Calmese from filing any further motions.

Plaintiff also states counsel explained to Defendant that the Notice was frivolous in light of the Court's Order of August 10, 2010, and that Defendant would be violating the Court's Order

forbidding the filing of any additional motions if Defendant filed the Notice. In its Response (#244), Plaintiff further states: "There is only one meaningful sanction left to impose against Calmese: the entry of an order of default." The Court construes Plaintiff's Response as, in part, another request for sanctions against Defendant.

On September 16, 2010, Defendant filed a Reply (#246) even though a reply to a discovery motion is not permitted under Local Rule 26-3 without leave of Court. In any event, Defendant repeats in his Reply: "By Minute Order dated July 29, 2010, (Doc. 209), the Court clearly ORDERED adidas to secure and provide reasonable access to the video so that Calmese's expert could review that original recording."

DISCUSSION

The Court notes initially that Defendant's "Notice" is, in effect, a Motion to Compel. By filing this Motion, Defendant has once again violated the Court's standing Order (#207) "not to file any more motions so that the parties focus their efforts on preparing for trial." Moreover, Defendant's Notice does not contain a certification that he complied with Local Rule 7-1 (which requires Defendant to confer meaningfully with Plaintiff before filing any motion) despite repeated warnings by the Court that compliance with Rule 7-1 is mandatory.

The Court also finds Defendant's interpretation of the Court's July 29, 2010, Order (#209) is erroneous. With respect to the actual video record of Defendant's deposition, the Court merely ordered Plaintiff to "propose a mechanism to ensure Defendant can be prepared to make his challenge of the deposition's authenticity. If necessary, Plaintiff shall secure the original deposition video and provide Defendant with reasonable access to the video so that his expert [may] review that original recording." The Court has never ordered that Plaintiff must obtain possession of the deposition video. In fact, the Court approved Plaintiff's plan to make the original deposition video available through Westlaw for Defendant's review, and the Court is satisfied that Plaintiff has complied.

Nonetheless, Defendant alleges in his Reply that "he was never aware of (Doc. 213) . . . until preparing this reply." In light of the foregoing factual recitation, the Court finds Defendant's "allegation" not credible.

Although the Court will have to consider the separate matter of Plaintiff's request for sanctions against Defendant raised in Plaintiff's Response (#244) to Defendant's Notice (#238), the Court declines to do so at this juncture. Pursuant to the Court's Order (#249) issued October 1, 2010, Defendant has been ordered to pay $9,106.50 as a result of sanctions related to Defendant's violations of other Court Orders. After the Court

receives the October 21, 2010 (or earlier), status report from Plaintiff's counsel anticipated in its October 1, 2010, Order (#249), the Court will determine whether additional sanctions are warranted.

CONCLUSION

For these reasons, the Court **DENIES** the relief requested by Defendant in his Notice (#238) of Plaintiff's Failure to Comply with this Court's Order Doc. 209. The Court orders Defendant not to make or to file any motion, notice or request of the Court until further order of the Court. Any violation of this Court's Orders or of the rules of the Court will be met with the ultimate sanction. The Court **DEFERS** ruling on Plaintiff's additional request for sanctions (#244) for the reasons set out in this Order.

IT IS SO ORDERED.

DATED this 1st day of October, 2010.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge